Supreme Court, U.S.
FILED

(1)

971501 MAR 10 1998

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term, 1997

Ricardo Francisco Acosta,

Petitioner,

V.

The State of Texas,

Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

Petition for Writ of Certiorari

Jim W. James, III
James & Thibodeaux, PLLC.
1716 Briarcrest, Suite 505
Bryan, Texas 77802
(409) 846-1934

Counsel of Record for Petitioner

32pp

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Amendment of the United States Constitution prohibits the government from seeking to determine the content of a defendant's mind, by requiring the defendant, after arrest for driving while intoxicated, but prior to Miranda warnings, to count backwards as a sobriety test?

TABLE OF CONTENTS

Question Presented for Review ii

Table of Contents..... iii

Table of Cited Authorities..... 1

Opinions Below 3

Jurisdiction..... 4

Constitutional Provisions Involved 4

Statement of the Case.....5

Reasons for Granting Certiorari.....7

Conclusion 17

Appendix A

Appendix B

Appendix C

TABLE OF CITED AUTHORITIES

United States Supreme Court Cases — Page

Commonwealth v. Conway, 368 Pa. Super 488, 534 A2d 541 (Pa App. 1987) 16

Curcio v. United States, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957) 13

Doe v. United States, 487 U.S. 201, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988) 9, 12

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) 9

Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L. Ed.2d 528 (1990) 7,8,10,11,13,14,15

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) 8,12

United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) 9

United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973) dissent by Justice Marshall..... 8

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) 9

State Cases — Page

Allred v. State, 622 So.2d 984 (Florida 1993) 15

Gassaway v. State, 957 S.W.2d 48 (Tex.Cr.App. 1997) 16

Lankford v. State, 419 S.E.2d 498 (Ga App. 1992 Cert.den.), 506 U.S. 1051, 113 S.Ct. 972, 122 L.Ed.2d 127 (1997) 16

People v. Bugbee, 559 NE2d 554 (Ill.App. 1990) 17

State v. Acosta, 951 S.W.2d 291 (Tex.App.-Waco 1997, pet. ref'd) 3,4,7,16

State v. Clute, 480 S.E.2d 85 (S.C. Ct. App. 1996) ... 16

State v. Fish, 893 P.2d 1023 (Oregon 1995) 15

State v. Zummach, 467 NW 2d 745 (ND 1992) 17

Vanhouton v. Commonwealth, 676 NE 2d 460 (Mass 1997) 17

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

Ricardo Francisco Acosta,
Petitioner,

V.

The State of Texas,
Respondent.

Petition For Writ of Certiorari

Petitioner, Ricardo Francisco Acosta, prays that this Honorable Court issue a Writ of Certiorari to review the opinion and judgment of the Court of Appeals for the Tenth Judicial District of Texas as upheld by the Texas Court of Criminal Appeals on December 10, 1997.

Opinions Below

The opinion of the Court of Appeals for the Tenth Judicial District of Texas was published at *State v. Acosta*, 951 S.W.2d 291 (Tex.App.-Waco 1997, pet.ref'd). A copy of that Court's opinion is attached as APPENDIX "A". That opinion reversed the trial court's suppression of the audio portion of a post-arrest, pre-Miranda, driving while intoxicated video of the Petitioner in

which the police required Petitioner to count backwards from thirty to one.

Petitoner's Petition For Discretionary Review to the Texas Court of Criminal Appeals was refused on December 10, 1997. A copy of the Texas Court of Criminal Appeals postcard Order Denying Review is attached as APPENDIX "B".

Jurisdiction

On December 10, 1997, the Texas Court of Criminal Appeals entered an order denying Petitioner's Petition for Discretionary Review of the opinion of the Court of Appeals for the Tenth Judicial District of Texas in *State v. Acosta*, 951 S.W.2d 291 (Tex.App.-Waco 1997, pet. ref'd). This Court has jurisdiction pursuant to 28 U.S.C. Section 1257.

Constitutional Provisions Involved

The question presented herein implicates the Fifth and Fourteenth Amendments to the United States Constitution. The pertinent parts of those provisions are as follows:

Amendment V

"No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

Amendment XIV

"[Nor] shall any State deprive any person of life, liberty, or property, without due process of law..."

Statement of the Case

A. Relevant Facts

The facts relevant to this petition are not in dispute. On November 5, 1993, Officer Robert Wilson of the College Station Police Department arrested Ricardo Francisco Acosta, Petitioner, for the offense of Driving While Intoxicated (SoF vol II p 10)[1]. After the arrest, but prior to giving Miranda warnings, Officer Wilson required Petitioner to perform several videotaped sobriety tests (SoF vol II p 11). On one of these tests, Petitioner was required to count backwards from thirty to one (SoF vol II p 11, State's Exhibit 1). The videotape reflected that Petitioner had difficulty in counting backwards from thirty to one and miscounted on several occasions (Tr p 11, State's Exhibit 1, SoF vol II p 12).

B. Procedural History Raising the Federal Question

Petitioner was charged by information with the offense of Driving While Intoxicated alleged to have occurred in Brazos County, Texas on November 5, 1993. Petitioner filed various motions in this case, including a Motion to Suppress Statements (Tr p 8-10). That motion urged the court to suppress custodial

---

[1] The record is cited as "SoF" (statement of the facts) and "Tr" (trial court clerk's transcript). In Texas parlance, the "statement of the facts" is the court reporter's transcription of the proceedings in the trial court, and the "transcript" is the clerk's collections of pleadings, jury charges, etc.

statements of Petitioner. The motion cited the Fifth and Fourteenth Amendments of the United States Constitution as a basis of the motion.

A hearing was held on the Motion To Suppress Statements before trial. The trial court granted the Motion to Suppress on December 16, 1996, as to the oral portion of the sobriety test done after arrest, but prior to Miranda warnings, which reflected that Petitioner was unable to accurately count backwards from thirty to one, (SoF vol II p 18-19).

The State thereafter filed Notice of Appeal (Tr p 20-21). The appeal by the State of Texas to the Court of Appeals for the Tenth Judicial District of Texas was abated until the trial court entered a written order containing findings of fact and conclusions of law. The trial court's written order of August 21, 1997, cited the Fifth Amendment to the United States Constitution as the basis of suppressing Petitioner's statements (Supplemental Tr vol I p 2). The pertinent part of the trial court's written order is attached hereto as APPENDIX "C".

The federal question at issue was raised by The State of Texas in its appeal to the Court of Appeals for the Tenth Judicial District of Texas. Petitioner, in appellee's brief, defended the trial court's suppression based on the Fifth Amendment of the United States Constitution. The Court of Appeals for the Tenth Judicial District of Texas overruled the trial court's order on the

motion to suppress, holding that the Fifth Amendment was not implicated by the counting. See *State v. Acosta*, 951 S.W.2d 291 (Tex.App.-Waco 1997, pet. ref'd). Petitioner filed a Petition for Discretionary Review to the Texas Court of Criminal Appeals raising the Fifth Amendment question. The Court of Criminal Appeals entered an order denying discretionary review on December 10, 1997.

Reasons for Granting the Petition

Review on a writ of certiorari should be granted in this case pursuant to Rules 10(b) and 10(c) of the Supreme Court Rules.

The decision from the Texas state courts has attempted to answer an important federal question that was left open and unanswered by the United States Supreme Court in *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528, (1990).

Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) dealt with a case of a defendant arrested for driving while intoxicated. After his arrest and prior to his being given Miranda warnings, Muniz was given a series of sobriety tests. Muniz was required to tell the officer the date of his sixth birthday as well as count backwards.

Muniz did not raise the issue of whether the required counting was prohibited by the Fifth Amendment.

The United State Supreme Court in *Pennsylvania v. Muniz* in footnote 17 stated specifically,

> "We therefore need not decide today whether Muniz's counting (or not counting) itself was testimonial within the meaning of the privilege." *Muniz*, 496 U.S. at 603.

However, the United States Supreme Court did hold in *Pennsylvania v. Muniz*, that the trial court should have suppressed that portion of the videotape, taken before the defendant was Mirandized, in which the defendant was asked, and was unable to determine, the date of his sixth birthday.

The reason the case at bar is so important is because it goes to the root of what the Fifth Amendment is designed to protect and what it protects in a modern society in which physiological responses can reveal the contents of a person's mind.

Though the Fifth Amendment now seems limited to testimonial evidence, this was not always a forgone conclusion. See *United States v. Mara*, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973), dissent by Justice Marshall.

In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court held that the Fifth Amendment privilege does not protect a suspect from being compelled by the State to produce real or physical evidence. Rather, that privilege protects only communicative information. In *Schmerber* the Court stated that a person suspected of driving

while intoxicated could be forced to provide a blood sample because that sample was physical evidence, outside the scope of the privilege.

In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), the Supreme Court held that a suspect could be compelled to participate in a line-up and to repeat a phrase provided by police so that a witness could identify his voice.

In *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), the Supreme Court held that a suspect could be compelled to provide a voice exemplar to have his voice analyzed.

In *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), the Court made clear that a handwriting exemplar, in contrast to the content of what is written, is an identifying characteristic outside of the Fifth Amendment privilege. The Supreme Court stated that had the suspect been asked to provide a writing sample of his own composition, the content of the writing would have reflected mental processes and hence would have been testimonial.

In *Doe v. United States*, 487 U.S. 201, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988), the Court held that the compelled execution of a consent directive did not force the suspect to express the

content of his mind and therefore was not protected by the Fifth Amendment.

Under all of these cases the Supreme Court has allowed purely physical evidence to be admitted and obtained from a defendant without implicating the Fifth Amendment. In none of those cases did the Supreme Court hold that a person's thoughts, feelings or mental status could be compelled to be produced.

The Supreme Court, in *Muniz,* reiterated that physical attributes which do not reveal the state of a person's mind are not protected by the privelege. The Supreme Court held,

> "Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, see *Dionisio, supra*, does not, without more compel him to provide a testimonial response for purposes of the privilege." *Muniz*, 496 U.S. at 592.

But in *Muniz*, the Court held that asking a defendant to respond to a question of whether he knew the date of his sixth birthday was testimonial. It is impossible to distinguish having a defendant calculate the date of his sixth birthday, from having a defendant count backwards from thirty. The Supreme Court in *Muniz* stated,

> "... Muniz's answer to the sixth birthday question was incriminating, not just because of his delivery, but also because of his answer's content; the trier of fact could

> infer from Muniz's answer (that he did not know the proper date), that his mental state was confused."
> *Muniz*, 496 U.S. at 592.

The Supreme Court noted that the government in *Muniz* argued that it was not testimonial because the inference concerned the physiological functioning of the brain. The Court said that regardless of that fact, since the incriminating inference of mental confusion was drawn from a testimonial act, the evidence was inadmissible.

The government's argument leads to a slippery slope when it is asserted that physiological tests which can reveal the state or contents of a citizen's mind do not deserve Fifth Amendment protection. Query, if the government may argue that a suspect could be required to take a polygraph test and be required to answer the questions in a certain way? In other words, could a defendant be required to undergo a polygraph exam and be asked, "Did you kill X?". The defendant would be required to answer "no" to that question. The evidence elicited would then merely be the physiological responses recorded by the polygraph instrument, allowing a fact finder to draw a conclusion about the defendant's responses. Could the government argue in that situation that the Fifth Amendment is not implicated because only physiological testing is involved?

It should be held that the Fifth Amendment protects the contents of a person's mind and that protection must be jealously guarded. When a defendant is given "tests" that attempt to reveal the content of the mind (whether it is that he is confused leading a fact finder to conclude he is intoxicated or whether it is that his blood pressure and physiological responses indicate that he killed X), this is a constitutionally protected area.

The line which the Supreme Court has implicitly drawn is that a defendant can be required to parrot a response, but if the content of the vessel is void, the Fifth Amendment protects the individual from having the government compel that individual to provide the content.

In *Doe v. United States*, 487 U.S. 201, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988), the Supreme Court discussed *Schmerber* and its progeny saying,

> "The Court accordingly held that the privilege was not implicated... because the suspect was not required to disclose any knowledge he might have or to speak his guilt... It is the extortion of information from the accused... The attempt to force him to disclose the contents of his own mind... That implicates the self incrimination clause... Unless some attempt is made to secure a communication - written, oral or otherwise - upon which reliance is to be placed as involving consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one." *Doe*, 487 U.S. at 210.

In *Curcio v. United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957), the Supreme Court likewise held that it was the attempt to have a defendant disclose the content of his mind that the Fifth Amendment protects.

It is the content of Petitioner's mind that the inability to count from thirty to one reflects.

It is difficult to distinguish the holding in *Muniz* from the facts of this case. The inability to calculate the sixth birthdate and the inability to count backwards from thirty to one, both show a confused mental state due to the content of the statements. It is this insight into the mental state that the Fifth Amendment protects. The Supreme Court, in *Muniz* stated:

> "The Commonwealth and the United States as amicus curiae argue that this incriminating inference does not trigger the protections of the Fifth Amendment privilege because the inference concerns the physiological functioning of Muniz's brain, (brief for petitioner 21), which is asserted to be every bit as real or physical as the physiological make up of his blood and the timbre of his voice.
>
> But this characterization addresses the wrong question; that the fact to be inferred might be said to concern the physical status of Muniz's brain merely describes the way in which the inference is incriminating. The correct question for present purposes is whether the incriminating inference of mental confusion is drawn from a testimonial act or from physical evidence." *Muniz*, 496 U.S. at 593.

The Supreme Court then discusses the trilemma faced by Muniz and concludes,

> "... the sixth birthday question in this case required a testimonial response. When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma. By hypothesis, the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent, see note 10, supra. Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was [correct date]) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his responses, but also from a testimonial aspect of that response." *Muniz*, 496 U.S. at 598,599.

The test that seems to be enunciated by the Supreme Court is that the Fifth Amendment does not protect a suspect from providing evidence unless that evidence helps to reveal the content of his mind. It is the communicative nature and the confused state of the mind that both calculating a sixth birthday as well as counting from thirty to one reveal.

This court should resolve the constitutional question left open in *Muniz*.

Furthermore, the decision of the Texas courts conflicts with the decisions of other state courts of last resort in Florida and Oregon, specifically in the cases of *Allred v. State*, 622 So.2d 984 (Fla. 1993) and *State v. Fish*, 893 P.2nd 1023 (Ore. 1995). Those cases, while technically based on analagous provisions of state constitutions, are in conflict with the case at bar as to whether post-arrest required counting implicates any right against self-incrimination.

The Supreme Court of Florida in *Allred v. State*, 622 So.2d 984 (Fla. 1993) held that when a defendant under similar circumstances as Petitioner, was ordered to say the alphabet, this invoked self-incrimination protection. The *Allred* court said,

> "If the recitation of the alphabet were admitted only to show slurred speech, we would agree that only physical evidence is involved. We can not agree that the information disclosed in the instant cases however is mere physical information. The content is incriminating evidence out of the suspect's own mouth. The incriminating inference is drawn from the testimonial act - answering the question incorrectly, not from the physical evidence - slurred speech." *Allred*, 622 So.2d at 987.

In *State v. Fish*, 893 P.2d 1023 (Ore. 1995) the Supreme Court of Oregon held that sobriety tests which attempt to show

the state of mind of a defendant are protected as being testimonial in nature. Those tests which triggered protection against self-incrimination included tests that draw upon a person's memory and ability to communicate, such as counting, answering questions about date of birth, estimating periods of time and reciting the alphabet. See also *Commonwealth v. Conway*, 368 Pa.Super 488, 534 A 2d 541 (Pa App. 1987) and *State v. Clute*, 480 SE 2d 85 (S.C. Ct.App. 1996) which held that the Fifth Amendment prohibited the post-arrest, pre-Miranda required counting condoned by the *Acosta* appellate courts.

Contrary to those decisions is the holding by the Texas courts in the case at bar as well as the recent decision by the Texas Court of Criminal Appeals in *Gassaway v. State*, 957 S.W.2d 48 (Tex.Cr.App. 1997). The Texas Court of Criminal Appeals held:

> "Neither reciting the alphabet nor counting backwards involves an express or implied assertion of fact or belief ... His recitation of the alphabet and counting backwards was not compelled in violation of his right to be free from self incrimination, therefore failing to trigger Fifth Amendment protection." *Gassaway*, 957 S.W.2d at 51.

See also *Lankford v. State*, 419 SE 2d 498 (Ga App. 1992, cert.den.), 506 U.S. 1051, 113 S.Ct. 972, 122 L.Ed.2d 127 (1993); *People v. Bugbee*, 559 NE 2d 554 (Ill.App. 1990); *Vanhouton v. Commonwealth*, 676 NE 2d 460 (Mass 1997);

State v. Zummach, 467 NW 2d 745 (ND 1992) all holding in acccord with the Texas Court of Criminal Appeals and in conflict with the Oregon, Florida, Pennsylvania and South Carolina courts.

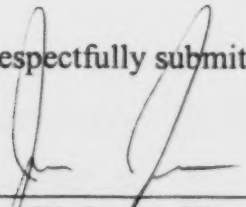
This case provides the United States Supreme Court an opportunity to make clear the scope of the Fifth Amendment and to ensure that the content of a person's mind is protected by the Fifth Amendment from governmental intrusion.

Conclusion

The Texas courts erred in holding that when a defendant is under arrest and before he is Mirandized, there is no Fifth Amendment right implicated in requiring him to count from thirty to one to reveal the status of his mind.

For the foregoing reasons, this Court should grant the petition for writ of certiorari and reverse the Court of Appeals for the Tenth Judicial District of Texas and affirm the trial court's ruling suppressing the oral counting of the defendant.

Respectfully submitted,



Jim W. James, III
JAMES & THIBODEAUX, P.L.L.C.
P.O. Box 1146
1716 Briarcrest, Suite 505
Bryan, Texas 77806
PH: (409) 846-1934
FAX: (409) 846-3028

Counsel of Record for Petitioner

APPENDIX A

Opinion of the Court of Appeals for the Tenth Judicial District of Texas in ***State v. Acosta***, 951 S.W.2d 291 (Tex.App.-Waco, September 3, 1997, pet. ref'd)

IN THE
TENTH COURT OF APPEALS

NO. 10-97-002-CR

THE STATE OF TEXAS,
Appellant

V.

RICARDO FRANCISCO ACOSTA,
Appellee

From the County Court at Law No. 2
Brazos County, Texas
Trial Court # 410-94

OPINION

The State charged Appellee Ricardo Francisco Acosta by information with the misdemeanor offense of driving while intoxicated. *See* Act of May 27, 1983, 68th Leg., R.S., ch. 303, § 3, 1983 Tex. Gen. Laws 1568, 1575 (former TEX. REV. CIV.

STAT. ANN. Art. 6701 l-1(b)), repealed by Act of May 29, 1993, 73rd Leg., R.S., ch. 900 § 1.15, 1993 Tex. Gen. Laws 3586, 3704. Acosta filed a motion to suppress a videotape which recorded the manner in which he performed sobriety tests at the Brazos County Jail. At a pretrial hearing, the court granted the motion in part and suppressed the audio portion of the videotape in which Acosta attempted to count backwards from thirty to one.

The State brings this interlocutory appeal from the court's suppression order under article 44.01(a)(5) of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN art. 44.01(a)(5) (Vernon Supp. 1997). By a single point of error, the State contends that the court erred in granting Acosta's motion to suppress.

The State relies on our decision in ***Dawkins v. State*** and later cases citing ***Dawkins***, 822 S.W.2d 668, 672 (Tex.App. - Waco 1991), *pet. ref'd per curiam*, 825 S.W.2d 709 (Tex.Crim.App.-1992); accord ***Vester v. State***, 916 S.W.2d 708, 712-13 (Tex.App.-Texarkana 1996, no pet.); ***Branch v. State***, 932 S.W.2d 577, 580-81 (Tex.App.-Tyler 1995, no pet.). These cases were all decided on Fifth Amendment grounds.

Acosta responds that even if the trial court's decision is incorrect under Fifth Amendment principles, we must nevertheless affirm the suppression ruling because the court did

not specify whether its ruling was based on the Fifth Amendment, the state constitution, or state statutory grounds.

However, because the trial court did not enter a written order, we abated this appeal because it was premature. *See* ***State v. Acosta***, No. 10-97-001-CR, slip op. at 2 (Tex.App. - Waco July 23, 1997, no pet.). Upon abatement, the trial court prepared a written order which also contained findings of fact and conclusions of law. In this order, the trial court states that it suppressed the evidence on the belief that Acosta's Fifth Amendment rights were violated. Thus, because the trial court has expressly set forth the basis upon which it suppressed the evidence, we limit this opinion to a discussion of whether the evidence was properly suppressed under the Fifth Amendment.

Officer Robert Wilson with the Brazos Valley Narcotics Task Force stopped Acosta on November 5, 1993, for suspicion of driving while intoxicated ("DWI"). After observing Acosta's condition and after having Acosta attempt sobriety tests at the scene, Wilson arrested him. At the jail, Acosta attempted additional sobriety tests which Wilson recorded on videotape. One of these tests required Acosta to count backwards from thirty to one. Wilson read Acosta his *Miranda* warnings after he had completed the sobriety testing at the jail.

At the suppression hearing, Acosta asked the court to suppress the aural evidence of Acosta attempting to count

backwards. The court suppressed the evidence by a written order concluding that Wilson's request that Acosta perform the test violated his Fifth Amendment rights. In the order, the court found that "by asking [Acosta] to count backwards from thirty, while in police custody and before reading *Miranda* warnings, [Wilson] was seeking a testimonial response to a custodial interrogation in violation of [Acosta's] 5th Amendment rights."

Acosta argues that the counting exercise which Wilson required him to perform is testimonial in nature and thus, subject to the strictures of the Fifth Amendment. *See* ***Pennsylvania v. Muniz***, 496 U.S. 582, 598-600, 110 S.Ct. 2638, 2649, 110 L.Ed. 2d 528 (1990); ***Vickers v. State***, 878 S.W.2d 329, 330 (Tex. App. - Fort Worth 1994, pet. ref'd).

In ***Dawkins*** we held that counting is not testimonial in nature because it does not involve "an express or implied assertion of fact." ***Dawkins***, 822 S.W.2d at 672; *compare* ***Muniz***, 496 U.S. at 597, 110 S.Ct. at 2648; *but cf.* ***Vickers***, 878 S.W.2d at 331. The Supreme Court expressly declined to decide this issue in ***Muniz***. ***Muniz***, 496 U.S. at 603 n. 17, 110 S.Ct. at 2651 n. 17. Thus we relied on other precedents for our decision. ***Dawkins***, 822 S.W.2d at 672 (citing ***Jones v. State***, 795 S.W.2d 171, 176 (Tex.Crim.App. - 1990); ***Chadwick v. State***, 795 S.W.2d 177, 177 (Tex. Crim. App. 1990).

The Supreme Court has not addressed this question. Acosta cites ***Vickers*** as the only authority which disagrees with our analysis in ***Dawkins***.[1] We continue to believe that ***Dawkins***

---

[1] Our research reveals that no clear majority rule has emerged among the states after ***Muniz***. Five have held that recitation of the alphabet and/or counting exercises are not testimonial in nature. ***Lankford v. State***, 204 Ga. App. 405, 419 S.E. 2d 498, 500 (Ga. Ct. App. 1992), *cert. denied*, 506 U.S. 1051, 113 S.Ct. 972, 122 L.Ed. 2d 127 (1993) (alphabet); ***People v. Bugbee***, 201 Ill. App. 3d 952, 559 N.E.2d 554, 558 (Ill. App. Ct. 1990) (alphabet). ***State v. Maze***, 16 Kan. App. 2d 527, 825 P.2d 1169, 1173 (Kan. Ct. App. 1992) (alphabet); ***Vanhouton v. Commonwealth***, 424 Mass. 327, 335-37, 676 N.E.2d 460, 466 (1997) (alphabet); ***State v. Zummach***, 467 N.W.2d 745, 746 (N.D. 1991) (alphabet). The Arizona Court of Appeals, Division One, reached a similar decision although the sobriety testing in issue is unclear from the court's opinion. ***State v. Lee***, 184 Ariz. 230, 908 P.2d 44, 47 (Ariz.Ct.App. 1995) (citing ***State v. Theriault***, 144 Ariz. 166, 696 P.2d 718, 7119 (Ariz. Ct. App. 11984)). ***Theriault*** involved both recitation of the a'phabet and counting exercises. ***Theriault***, 696 P.2d at 719.

Four have reached the opposite conclusion, although two of these limited their decisions to state constitutional grounds. ***Allred v. State***, 622 So. 2d 984, 987 (Fla. 11993) (alphabet and counting) (decided on state constitutional grounds only); ***State v. Fish***, 321 Or. 48,60,893 P.2d 1023. 1030 (1995) (alphabet and counting) (decided on state constitutional grounds only); ***Commonwealth v. Conway***, 368 Pa. Super 488, 497-500, 534 A.2d 541, (1987) (alphabet); ***State v. Clute***, 480 S.E. 2d 85, 88-89 (S.C. Ct. App. 1996) (decided admission of alphabet test erroneous under ***Muniz***, but harmless in light of other evidence of intoxication).

At least five other states and the District of Columbia addressed the question prior to ***Muniz*** but have not revisisted the issue. The courts of these states concluded that recitation of the alphabet and/or counting exercises are not testimonial in nature. ***Oxholm v. District of Columbia***, 464 A. 2d 113, 114 (D.C. 1983) (alphabet); ***McAvoy v. State***, 70 Md. App. 661, 523 A. 2d 618, 623 (Md. Ct. Spec. App. 1987), *aff'd*, 314 Md. 509, 551 A.2d 875 (1989) (alphabet); ***People v. Burhans***, 166 Mich. App. 758, 762-63, 421 N.W.2d 285, 288 (1988) (counting); ***State v. Thompson***, 237 Mont. 384, 387, 773 P.2d 722, 724 (1989) (alphabet); ***State v. Meek***, 444 N.W.2d 48, 50 (S.D. 1989) (alphabet and counting); ***State v. Haefer***, 110 Wis. 2d 381, 328 N.W. 2d 894, 897 (1982) (the sobriety testing in issue is unclear from the court's opinion, but the court describes it as evoking "words show[ing] the physical manifestations of intoxication").

As noted above in the opinion, two of our sister courts have adopted the analysis of ***Dawkins*** in published opinions. ***Vester v. State***, 916 S.W.2d 708, 712-13 (Tex.App.-Texarkana 1996, no pet.) (alphabet and counting); ***Branch v. State***, 932 S.W.2d 577, 580-81 (Tex.App.-Tyler 1995, no pet.) (alphabet). Two more have done so in unpublished opinions which carry no precedential authority. See ***Overman v. State***, No. 3-95-682-CR, slip op. at 8 (Tex.App.-Austin May 1, 1997, no pet. h.) (not designated for publication) (alphabet and counting); ***Gassaway v. State***, No. 5-94-1898-CR, slip op. at 4-5 (Tex.App.-Dallas Oct. 25, 1996, pet. granted) (on rehearing) (not designated for publication) (alphabet and counting); *but cf.* TEX. R. APP. P 90(i) (unpublished opinions must not be cited as authority). On April 30, the Court of Criminal Appeals granted review of ***Gassaway*** on a single ground. "Whether the court of appeals erred in holding the appellant's 5th amendment rights were not violated when the jury was allowed to view the appellant reciting the alphabet on a D.W.I. videotape." ***Gassaway v. State***, No. 97-0037 (pending before the Court of Criminal Appeals).

represents a correct statement of the law. The counting which Wilson requested Acosta to perform did not require "an express or implied assertion of fact." ***Dawkins***, 822 S.W.2d at 672. Thus, Wilson's request did not elicit a testimonial response. *Id.*

Because Acosta's response to the counting test was not testimonial. Wilson had no need to give him his *Miranda* warnings prior to the test. *See* ***Morris v. State***, 897 S.W.2d 528, 531 (Tex.App.-El Paso 1995, no pet.) (citing ***Jones***, 795 S.W.2d at 176). Thus, the court erred in suppressing the aural evidence of Acosta attempting to perform this test.

Because the counting test performed by Acosta was not testimonial and because it was not made pursuant to custodial interrogation, the court erred in suppressing the aural evidence of his performance. Thus, we sustain the State's sole point.

We reverse the suppression order and remand this cause for further proceedings consistent with this opinion.

REX D. DAVIS
Chief Justice

Before Chief Justice Davis
Justice Cummings and
Justice Vance
Reversed and remanded
Opinion delivered and filed September 3, 1997
Publish

APPENDIX B

Order of the Texas Court of Criminal Appeals denying Petitioner's Petition for Discretionary Review.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

December 10, 1997
COA#: 10-97-00001-CR
RE: Case No. 1343-97
STYLE: STATE OF TEXAS V. ACOSTA, RICARDO FRANCISCO

On this day, the Appellee's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

JIM W JAMES
P O BOX 1146
BRYAN TX 77806

APPENDIX C

Trial Court's Written Order Containing Findings of Fact and Conclusions of Law on Defendant's Motion To Suppress
(Supplemental Transcript vol I p 2)

"… Based on the authority and argument presented, this court finds that by asking the Defendant to count backwards from thirty, while in police custody and before Miranda warnings, the State was seeking a testimonial response to a custodial interrogation in violation of the Defendant's 5th Amendment rights.

Accordingly, it is **ORDERED** that the Defendant's Motion to Suppress Statements is **GRANTED IN PART**, and that the audio portion of the State's DWI videotape wherein the Defendant was required to count backwards from thirty is suppressed."

/s/ Sarah Ryan

Sarah Ryan Presiding Judge